

date: **00T 02 1990**to: District Counsel, Manhattan NA:MAN
Attn: Steven Winningham

from: Assistant Chief Counsel (Tax Litigation) CC:TL

subject: [REDACTED]

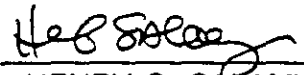
This is in response to your request for formal tax litigation advice, dated April 20, 1990, as supplemented by your memorandum, dated July 17, 1990, providing additional information. As we informally notified you, your request for advice was referred by us to the Office of the Assistant Chief Counsel (Income Tax & Accounting), CC:IT&A, because we believed a preliminary matter involving G.C.M.'s 36263 and 36624 needed resolution. The question was whether the erroneous refund to the [REDACTED] was a rebate erroneous refund or a nonrebate erroneous refund. In addition, we were concerned whether the Service should take a position that math errors not discovered or adjusted until after expiration of the three years from the filing of a return could be included in a deficiency notice when the Service had the right of recapture for three years by summary assessment. A third issue that is clearly factual, but caused us concern, was whether the Form 872-A restriction included computational errors after the three year statute, where the only adjustments fitting the restriction would otherwise result in an overassessment. This involved interpreting the agreement itself. We preliminarily agreed with you that such errors were "consequential changes to other items."

By memorandum, dated September 27, 1990, a copy of which is attached, the Office of the Assistant Chief Counsel (Income Tax & Accounting) concludes that a math error may be recaptured by inclusion in a notice of deficiency so long as the limitation period is otherwise open. Furthermore, that Office concludes the erroneous refund is a rebate erroneous refund which may be recaptured under the deficiency procedures assuming the limitation period is otherwise open. With respect to the third issue, the Service has colorable arguments that the agreement itself will support recapture of the math error and the erroneous refund. However, there are hazards of litigation and the issue is not so clearly in the Government's favor.

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As the September 27, 1990 memorandum has concluded the hazards of litigating the specific facts of this case, viz. lack of a deficiency without the math error and the erroneous refund, could lead to fulfillment of the maxim that "bad facts make bad law." However, there is no case law on this issue as the Tax Court stated in Adler v. Commissioner, 85 T.C. 535, 541 (1985), particularly since Fleming v. Commissioner, 33 T.C. 336 (1959) appears to be distinguishable. We believe the September 27, 1990 memorandum has fashioned reasonable arguments that could persuade the Court to rule in the Government's favor and we recommend that serious consideration be given to litigation, perhaps in a fully submitted case under Tax Court Rule 122. On the other hand, if the taxpayer makes a reasonable offer, in the judgment of trial counsel, we would have no objection to accepting the settlement because of the hazards of litigation.

MARLENE GROSS
Assistant Chief Counsel
(Tax Litigation)

By: 
HENRY G. SALAMY
Chief, Branch No. 4
Tax Litigation Division

Attachment:
Copy memo CC:IT&A 9/27/90